

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF WASHINGTON

PETER J. HANSEN,)	
)	NO. CV-10-237-JPH
Plaintiff,)	
)	ORDER GRANTING PLAINTIFF'S
v.)	MOTION FOR SUMMARY JUDGMENT
)	AND REMANDING FOR FURTHER
)	PROCEEDINGS
MICHAEL ASTRUE,)	
Commissioner of Social)	(ECF No. 13)
Security,)	
)	
Defendant.)	

BEFORE THE COURT are cross-motions for Summary Judgment noted for hearing without oral argument on July 22, 2011 (ECF No. 13, 16). Attorney Maureen J. Rosette represents plaintiff; Special Assistant United States Attorney Jordan D. Goddard represents the Commissioner of Social Security. The parties consented to proceed before a magistrate judge (ECF No. 7). On June 27, plaintiff filed a reply (ECF No. 18). After reviewing the administrative record and the briefs filed by the parties, the court **GRANTS** Plaintiff's Motion for Summary Judgment (ECF No. 13), **REVERSES AND REMANDS** for further administrative proceedings, and **DENIES** Defendant's Motion for Summary Judgment (ECF No. 16).

JURISDICTION

Plaintiff protectively applied for supplemental security income (SSI) benefits on February 24, 2006, due to a back injury and liver disease (Tr. 74-77, 119). The application was denied initially and on reconsideration (Tr. 40-41, 43-46).

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1 A hearing was held on February 1, 2008, before
2 Administrative Law Judge (ALJ) R.J. Payne (Tr. 586-621). Mr.
3 Hansen, represented by counsel, and two medical experts testified.
4 On February 25, 2008, the ALJ issued an unfavorable decision (Tr.
5 15-24). The Appeals Council denied Plaintiff's request for review
6 on June, 30, 2010 (Tr. 3-6). The ALJ's decision became the final
7 decision of the Commissioner, which is appealable to the district
8 court pursuant to 42 U.S.C. § 405(g). Plaintiff filed this action
9 for judicial review pursuant to 42 U.S.C.
10 § 405(g) on July 30, 2010 (ECF No. 2,4).

11 **STATEMENT OF FACTS**

12 The facts have been presented in the administrative hearing
13 transcript, the ALJ's decision, the briefs of both parties. They
14 are only briefly summarized here.

15 Plaintiff was forty-three years old when he applied for
16 benefits and 45 at the hearing (Tr. 604). He earned a GED and was
17 previously self-employed as a dairy farmer until around 2000 (Tr.
18 605-606). In February 2004 he was hospitalized with a
19 gastrointestinal bleed. Plaintiff was diagnosed with acute
20 alcoholic hepatitis, cirrhosis, and advised he needed to stop
21 drinking. By April 2004, Mr. Hansen's liver had significantly
22 improved with abstinence from alcohol. In 2005 he was diagnosed
23 with diabetes. He has suffered from back pain for the last several
24 years because he broke three vertebrae when he was young.

25 At the time of the gastrointestinal bleed, Mr. Hansen was
26 diagnosed with depression and prescribed antidepressant
27

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1 medication.

2 **SEQUENTIAL EVALUATION PROCESS**

3 The Social Security Act (SSA) defines disability as the
4 "inability to engage in any substantial gainful activity by reason
5 of any medically determinable physical or mental impairment which
6 can be expected to result in death or which has lasted or can be
7 expected to last for a continuous period of not less than twelve
8 months." 42 U.S.C. §§ 423(d)(1)(A), 1382c(a)(3)(A). The Act also
9 provides that a Plaintiff shall be determined to be under a
10 disability only if any impairments are of such severity that a
11 plaintiff is not only unable to do previous work, but cannot,
12 considering plaintiff's age, education and work experiences,
13 engage in any other substantial gainful work which exists in the
14 national economy. 42 U.S.C. §§ 423(d)(2)(A), 1382c(a)(3)(B). Thus,
15 the definition of disability consists of both medical and
16 vocational components. *Edlund v. Massanari*, 253 F.3d 1152, 1156
17 (9th Cir. 2001).

18 To decide if a claimant is entitled to benefits, an ALJ
19 conducts a five-step inquiry. 20 C.F.R. §§ 404.1520 and 416.920.
20 The ALJ first considers whether the claimant is engaged in
21 substantial gainful activity; if not, the ALJ asks in the second
22 step whether the claimant has a severe impairment (i.e., one that
23 significantly affects his or her ability to function); if so, the
24 ALJ asks in the third step whether the claimant's condition meets
25 or equals one of those outlined in the Listing of Impairments in
26 Appendix 1 of the regulations; if not, then in the fourth step the
27 ALJ asks whether the claimant can perform his or her relevant

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1 work; if not, finally, the ALJ in the fifth step asks whether the
 2 claimant can perform other jobs that exist in substantial numbers
 3 in the national economy. 20 C.F.R. §§ 404.1520 and 416.920.

4 The burden of proof is on the plaintiff to establish a *prima*
 5 *facie* case of entitlement to disability benefits. *Rhinehart v.*
 6 *Finch*, 438 F.2d 920, 921 (9th Cir. 1971); *Meanel v. Apfel*, 172
 7 F.3d 1111, 1113 (9th Cir. 1999). The initial burden is met once
 8 plaintiff establishes that a physical or mental impairment
 9 prevents the performance of previous work. At step five, the
 10 burden shifts to the Commissioner to show (1) plaintiff can
 11 perform other substantial gainful activity, and (2) a "significant
 12 number of jobs exist in the national economy" which plaintiff can
 13 perform. *Tackett v. Apfel*, 180 F.3d 1094, 1099 (1999); *Kail v.*
 14 *Heckler*, 722 F.2d 1496, 1498 (9th Cir. 1984).

15 STANDARD OF REVIEW

16 Congress has provided a limited scope of judicial review of a
 17 Commissioner's decision. 42 U.S.C. § 405(g). A Court must uphold
 18 the Commissioner's decision, made through an ALJ, when the
 19 determination is not based on legal error and is supported by
 20 substantial evidence. *See Tackett*, 180 F.3d at 1097. "The
 21 [Commissioner's] determination that a plaintiff is not disabled
 22 will be upheld if the findings of fact are supported by
 23 substantial evidence." *Delgado v. Heckler*, 722 F.2d 570, 572 99th
 24 Cir. 1983). Substantial evidence is more than a mere scintilla,
 25 *Sorenson v. Weinberger*, 514 F.2d 1112, 1119 n. 10 (9th Cir. 1975),
 26 but less than a preponderance. *McAllister v. Sullivan*, 888 F.2d
 27 599, 601-602 (9th Cir. 1989); *Desrosiers v. Secretary of Health*

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1 *and Human Services*, 846 F.2d 573, 576 (9th Cir. 1988). Substantial
2 evidence "means such evidence as a reasonable mind might accept as
3 adequate to support a conclusion." *Richardson v. Perales*, 402 U.S.
4 389, 401 (1971)(citations omitted). "[S]uch inferences and
5 conclusions as the [Commissioner] may reasonably draw from the
6 evidence" will also be upheld. *Mark v. Celebrezze*, 348 F.2d 289,
7 293 (9th Cir. 1965). On review, the Court considers the record as
8 a whole, not just the evidence supporting the decision of the
9 Commissioner. *Weetman v. Sullivan*, 877 F.2d 20, 22 (9th Cir.
10 1989), quoting *Kornock v. Harris*, 648 F.2d 525, 526 (9th Cir.
11 1980).

12 It is the role of the trier of fact, not this Court, to
13 resolve conflicts in the evidence. *Richardson*, 402 U.S. at 400. If
14 evidence supports more than one rational interpretation, the Court
15 may not substitute its judgment for that of the Commissioner.
16 *Tackett*, 180 F.3d at 1097. Nevertheless, a decision supported by
17 substantial evidence will still be set aside if the proper legal
18 standards were not applied in weighing the evidence and making the
19 decision. *Browner v. Secretary of Health and Human Services*, 839
20 F.2d 432, 433 (9th Cir. 1987). Thus, if there is substantial
21 evidence to support the administrative findings, or if there is
22 conflicting evidence that will support a finding of either
23 disability or nondisability, the finding of the Commissioner is
24 conclusive. *Sprague v. Bowen*, 812 F.2d 1226, 1229-1230 (9th Cir.
25 1987).

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ALJ'S FINDINGS

At step one, the ALJ found Plaintiff did not engage in substantial gainful activity after he applied for benefits on February 24, 2006 (Tr. 17). At step two, he found Plaintiff has the following severe impairments: liver disease, low back pain, borderline intellectual functioning, and depression (*Id.*). At step three, the ALJ found none of the impairments alone or in combination meet or medically equal one of the listed impairments in 20 C.F.R. Part 404, Subpart P, Appendix 1 (Tr. 18). The ALJ found Plaintiff's RFC, which includes mental and non-exertional limitations, limits him to a range of light work (Tr. 20). At step four, he found Plaintiff is unable to perform any past relevant work (Tr. 23). At step five, relying on the Grids and testimony outside the record, he found there are other jobs Plaintiff can do (Tr. 24).

DISCUSSION

Plaintiff contends substantial evidence did not support the ALJ's decision and he made several legal errors. The error at step five is dispositive.

A. Step five

Once the sequential analysis has reached step five, in order to support a conclusion that an individual is not disabled, the Social Security Administration must provide evidence that demonstrates other work exists in significant numbers in the national economy that the claimant can do, given the claimant's residual functional capacity. There are two ways the ALJ can meet this burden: (1) by the testimony of a vocational expert or (2) by

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1 reference to the Medical-Vocational Guidelines (the Grids), at 20
2 C.F.R. Pt. 404, subpt. P, App. 2. See *Tackett v. Apfel*, 180 F.3d
3 1094, 1101 9th Cir. 1999).

4 However, these Guidelines only apply when "a claimant's
5 functional limitations fall into a standardized pattern accurately
6 and completely described by the grids." *Tackett*, 180 F.3d at 1103
7 (9th Cir. 1999), citing *Jones v. Heckler*, 760 F.2d 993, 998 (9th
8 Cir. 1985).

9 Here, ALJ Payne noted vocational experts have historically
10 and routinely testified in prior hearings that an individual with
11 the same age, education, and work experience as the claimant, who
12 also has the same "types" of exertional and non-exertional
13 limitations, would not have a significant erosion of the job base
14 at the sedentary and light job levels due to the additional non-
15 exertional limitations (See Tr. 24). The ALJ erred.

16 The testimony of a vocational expert is required if, as in
17 this case, non-exertional impairments restrict work capacities.
18 *Polny v. Bowen*, 864 F.2d 661 (9th Cir. 1988). Here, the ALJ relied
19 on a combination of the grids and vocational expert testimony in
20 other cases. It is improper to rely on information outside the
21 record, as the Commissioner concedes (ECF No. 17 at 15). See
22 *Burkhart v. Bowen*, 856 F.2d 1335 (9th Cir. 1988)(vocational
23 conclusions reached by an ALJ, without input from vocational
24 expert, represents an improper reliance upon information outside
25 the record, deprives the claimant of an opportunity to cross-
26 examine or rebut, and lacks sufficient evidentiary support to
27 constitute substantial evidence). The Commissioner argues because

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1 the ALJ properly relied on the Grids as a framework, and
2 plaintiff's mental limitations did not significantly erode the
3 occupational base, the ALJ's error in relying on evidence outside
4 the record is harmless (ECF. No. 17 at 15-16). The Court
5 disagrees.

6 Previous vocational expert testimony is not evidence in this
7 case. The Commissioner bears the burden of proof at step five.
8 And, for the reasons articulated in *Burkhart, supra*, this court
9 finds the error is harmful.

10 The degree to which the job base is eroded by Plaintiff's
11 specific mental and non-exertional limitations requires a
12 vocational expert's testimony. See *Tackett*, 180 F.3d at 1102: use
13 of the grids is justified only when they completely and accurately
14 represent a claimants's limitations. In other words, a claimant
15 must be able to perform the *full range* of jobs in a given
16 category, i.e., sedentary, light, or medium work. *Tackett*, 180
17 F.3d at 1101-1102 (emphasis in the original)(citations omitted);
18 see also *Lounsbury v. Barnhart*, 468 F.3d 1111, 1115-1116 (9th
19 Cir. 2006)(Because the grids are not designed to establish
20 automatically the existence of jobs for persons with both severe
21 exertional and non-exertional impairments, they may not be used to
22 direct a conclusion of *nondisability*)(emphasis in the original).

23 By concluding that Plaintiff was not disabled without the
24 aid of the testimony of a vocational expert, after finding
25 plaintiff suffers mental and non-exertional limitations, the ALJ
26 committed reversible error.

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1 **B. Remedy**

2 To establish at step five whether Plaintiff was disabled
3 under the Social Security Act, the ALJ must hear testimony from a
4 vocational expert. Accordingly, the Court remands to the
5 Commissioner for further administrative proceedings.

6 **CONCLUSION**

7 The ALJ's ultimate findings must be supported by substantial
8 evidence and be free from legal error; if they are not the
9 decision must be reversed. 42 U.S.C. § 405(g); *See Meanel v.*
10 *Apfel*, 172 F.3d 1111, 1113 (9th Cir. 1999). Having reviewed the
11 record and the ALJ's conclusions, this Court finds that the ALJ's
12 step five determination is unsupported by substantial evidence and
13 contains harmful legal error.

14 **IT IS ORDERED:**

15
16 1. Plaintiff's Motion for Summary Judgment (**ECF No. 13**) is
17 **GRANTED**. The Commissioner's decision is **REVERSED** and the case is
18 **REMANDED** pursuant to sentence four for further administrative
19 proceedings.

20 2. Defendant's Motion for Summary Judgment (ECF No. 16) is
21 **DENIED**.

22 The District Court Executive is directed to file this Order,
23 provide copies to counsel for Plaintiff and Defendant, enter
24 judgment in favor of Plaintiff, and **CLOSE** this file.

25 DATED this 11th day of August, 2011.
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s/James P. Hutton

JAMES P. HUTTON

UNITED STATES MAGISTRATE JUDGE

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